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Social Welfare Legislation: An Introduction

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Abstract

The essay defines social welfare legislation as legislation which sets up a minimum standard, identifies persons who do not meet that standard, and creates a program for aiding those persons to reach or approach the minimum standard. Each of these aspects of social welfare legislation is then discussed. For example, some programs use a pure minimum standard; others are restitutionary, that is, they seek to reinstate some pre-existing state of society. Some programs grant vested rights to beneficiaries; others give uncontrolled discretion to officials to choose among eligibles. Some programs are centralized, some are decentralized. In terms of these characteristics, one can isolate two polar types of welfare program: the "middle-class" type, and the "charity." Political and economic forces in American society determine which characteristics cluster about a particular program. Programs for the minority poor tend to be "charity;" those for members of the middle-class and those culturally considered members of this class lack the discretionary features, paternalism, and stigma of "charity."

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One of the major events of the 1960's has been the declaration of war against poverty. The federal government, with loud publicity and much controversy, has proclaimed its desire to end poverty, eliminate racial discrimination, and equalize opportunity for white and negro, rich and poor in the United States. This public effort and the forces which underlie it, have stimulated scholars in many fields to turn their attention to research on problems of poverty and social welfare. Legal and political research have felt these influences, too. There has been a growing interest in social welfare legislation. This interest is relatively new; hence there is not much general agreement on what social welfare legislation is, and whether the study of social welfare legislation constitutes a "field" or not. We will begin by discussing some problems of definitions, then we will classify and analyze various kinds of social legislation, and suggest some further points for study.

I. A Problem of Definition

Does it make any sense to set up a category into which we can place legislation and programs to which we give the name "social legislation" or "welfare legislation" or "social welfare legislation"? Public assistance laws, laws on unemployment relief, free medical care for the poor, and vocational rehabilitation for the handicapped (among

others) would, by common consent, be put in such a category. Probably many people would claim that these laws are somehow different from laws which regulate the practice of medicine, adjust the tariff on imported wristwatches, or modify the penal code. They might also distinguish them from food and drug, health, fire and safety laws. But it might be hard to say exactly where the difference lies.

Some writers have singled out specific groups of laws for purposes of their own analysis. Thus Eveline Burns, in her important study of social security, singles out two kinds of programs which she calls social security laws. First, there are income-maintenance programs. In these, "the object of public action is to provide alternative income to persons whose normal private incomes have temporarily or permanently disappeared or to remove from individuals and families the burden of some very generally experienced charges on income." The second class consists of "arrangements to socialize the costs of some items which enter into normal consumption patterns but whose incidence is experienced differently by different families."[1] Public housing, public education, family allowances and free medical care fall into this second category.

Mrs. Burns' definition is useful for many purposes. It seems much broader, however, than the popular view of what is and what is not social welfare legislation. One frequent popular concept--how wide spread is another question--stresses the motives that lie behind enactment, or the assumed goals of the enacted program. In this view, the motivations

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[1] E. Burns, Social Security and Public Policy (1956) p. 4

behind some laws are unselfish. They respond to the general public interest as opposed to selfish private interests. Or they flow from humane rather than economic impulses. Common sense tells us that this idea is not entirely foolish. People do act on the basis of their social conscience. Legislators often vote for and fight for what they think is right rather than what they think is expedient. But to distinguish between welfare and non-welfare legislation cannot be done systematically and objectively, if underlying legislative motive is the test. The concept of legislative intent, in the sense of the motives underlying passage of a law, is as slippery as any in law and the policy sciences.[2] It is hard enough to talk about the motives of a single individual. It is infinitely worse to try to deal intelligently with the motives of two huge bodies of men. Are we concerned with the motives of the House and Senate Committees which approved the Program? With the key persons in pushing the bill on the floor? With the people in the Administration who wrote or conceived the program? With the rank and file legislators whose votes were necessary to pass it?[3]

Even if we could, for any person, tap a window in his mind and read his thoughts, we would not have solved our problem. Peoples' motives are mixed. And the motives of a group, such as a legislature, would be a mix of such mixes. Legislation in general is the result of compromise and bargaining, flowing out of the collision of interest groups. Mixed

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[2]There is an enormous literature on the concept. See, for example, H. Jones, "Statutory Doubts and Legislative Intention," 40 Col. L. Rev. 957 (1940)

[3]The problem is somewhat similar to the problem of deciding whose goals are the goals of an organization. See Herbert A. Simon, "On the Concept of Organizational Goal," 9 Admin. Sci. Q., 1 (1964)

motives are the rule, not the exception, in the enactment of law. So-called social welfare laws are no exception to this rule. The building trades unions lobbied strenuously for passage of the United States Housing Law of 1937. No doubt the union leaders sincerely believed in public housing. But they also hoped that the program would make jobs for union members.[4] The history of the Social Security Law of 1935[5] makes a similar point. The interests of organized labor were carefully protected. Workers who reached 65 had to leave work in order to qualify for benefits. As a general rule, the sponsors of welfare legislation must make "pay-offs" to business, or labor or both, or other blocs of power and interest, to have any hope of success. The reasons are obvious and are deeply imbedded in the nature of American politics. But as a result, it is not easy to use altruism, humanitarianism, or some criterion which depends upon the motive or intent of the legislature, or the motive or intent of those interest groups which backed the law as a test for social welfare legislation. Nor is it much better to ask what motives were "dominant" in passage. This question merely compounds the subjectivity that plagues analysis. Moreover, even if we could tell which laws and which lobbyists were more or less pure reformers, we would want to make distinctions between kinds of reform. The country no doubt needs to save the whooping crane, change to or from the decimal system, codify the law of commercial paper, and remove fornication from the list of crimes. The people fighting for these things usually have no material axe to grind. But the result of their actions is not usually thought of as social welfare legislation.

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[4] On the legislative history of this law, see T. McDonnell, The Wagner Housing Act (1957)

[5] 49 Stats. 620 (1935)

A definition which emphasizes the goals or ends of a legislative program would have problems of its own. Goals are as difficult to measure as motive or intent. Every law has a purpose or goal, unless it is a mere jumble of words. The subjective motive of the actors is not the same as the purpose of the act. A Congressman may vote for a law because he has gotten many angry letters from home demanding that he do so. His purpose in voting is to keep his constituents happy. This then can be said, in all accuracy, to be one of the purposes of the law: to keep constituents happy. But there may be other purposes of the law, at various levels of abstraction. The purpose of any law can be expressed in innumerable ways. A law is passed, prohibiting men from burning their draft cards, and prescribing a punishment. What is the purpose of the law? One might say it is (a) to ease a public clamor against draft protests; (b) to stop draft card burning; (c) to stamp out dissent against the war in Vietnam; (d) to give additional authority to federal marshals, prosecutors, and judges; (e) to put particular people in jail. All of these statements might conceivably be true. Moreover, some of them might be true even if they did not correspond to the subjective motives of most or even of any of those responsible for lobbying and passage of the law.

Goal and purpose, then, are troublesome concepts. Often in discussions of law and public policy people criticise specific programs, on the grounds they are false to their purposes in goals in operation or structure. People who criticise this way assume that they understand what the purposes are. Often, they are assuming that the stated goals are true goals. Yet stated goals may be symbolic, or false, or merely

instrumental. Practically any law which has a preamble sets out a list of noble goals. It would be naive to take these at face value. The Wisconsin Agricultural Marketing Act of 1957[6] announced state policy to promote orderly marketing of agricultural commodities; decried the fact that producers of agricultural commodities did not get a "fair return;" and argued that conditions as they existed "jeopardize the continued production of an adequate food supply. . . and may result in unemployment." The preamble further declared that enactment of the law was necessary to protect "the health, peace, safety and general welfare of the people." It would be unfair to judge the success or value of this law by asking whether it reduced urban unemployment, or even whether it promoted the "peace" and "safety" of the residents of Wisconsin. Those who actively worked for the passage of the law were undoubtedly more concerned with keeping the price of crops stable than in whether factory workers lost their jobs. Not that the preamble had no function. It laid the groundwork for an argument that the act was passed in the public interest. It proclaimed the nobility of motive of those who sponsored it. It attempted, however feebly, to enlist non-farmers in support of the measure. Yet the preamble clearly should not be taken at face value, as a true mirror of the motives or goals of the statute whatever these mean.

More often than not, the goals of a law that people speak about are not explicitly set out in the law itself. The legislative history and the social background of the law are the basis on which people come to speak of its goals. But any complex law rises out of a complex

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[6] Laws of Wis. 1957, Ch. 511

background. Any complex law is the result of compromise between interested parties. Whose goals are the goals of the law? Urban renewal is a good example of a law with an extremely complex background. There were urban reformers and planners concerned with the shape and beauty of the city. There were merchants worried about downtown decay. There were housing reformers eager to clear the slums. There were mayors anxious for showpiece projects in their cities. The program, even on paper, is a tangled web of subtle compromises and reciprocal accommodations.

The blunt political fact is that the program has no one overriding goal. It is proper to criticize the effects of the program. But one must be careful not to assume too easily that these effects are bad because they frustrate the goal of the program. Often they fulfill the goal of some one or more of the actors in the drama of passage; or they represent the closest one can get to certain goals under the constraints imposed by other groups or by circumstances. Indeed, in a discussion of organization goals, Herbert A. Simon has argued that

> In the decision-making situations of real life, a course of action, to be acceptable, must satisfy a whole set of requirements, or constraints. Sometimes one of these requirements is singled out and referred to as the goal of the action. But the choice of one of the constraints, from many, is to a large extent arbitrary. For many purposes it is meaningful to refer to the whole set of requirements as the (complex) goal of the action.[7]

One man's goals, he points out, are another man's restraints.

It is easy, and useful, to apply Simon's reasoning to legislation. Let us assume a complex program, on which many groups and interests have left their mark. Each contribution is, from the standpoint of the group

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[7] Herbert A. Simon, "On the Concept of Organizational Goal," 9 Admve. Sci. Q., 1, 7 (1964).

contributing it, an action toward a goal, determined however by the constraints imposed by all the other actors. So a law can seek the "goal" of more medical care for the aged, but within the limits set by certain constraints, including the political and economic power of a particular system of organized medicine. Others may take as their goal the idea of safeguarding and strengthening this system. To them, the drive to take care of old people is a constraint within which they must act. And so it goes.

We can forget about the goal of a law or program as a determinant of its character as social welfare legislation. What we are looking for is nothing more than an aspect of legislation, sometimes more and sometimes less important. We are looking for a concrete impulse which has made some greater or lesser mark on legislation, operating within more or less powerful constraints. But how shall we define that impulse?

A number of things about any statutory program can be more or less objectively observed. One can read the text and note what it says. Of course, the language may not be particularly revealing. The background and politics of the statute are indispensable in making sense out of the words which the legislators have used. Many statutes -- and virtually every statute which can be claimed as a social welfare law -- can at least be intelligently described in general terms, despite problems of background and language. In fact, the traffic in understanding is not all one way. The structure of a statutory program may help to clarify much that is mysterious in the background.

We will use the term social welfare legislation to describe enactments which, either as a whole or in some part, do the following three

things. First, the statute defines or implies a minimum standard of living or some minimum aspect of a standard of living. Second, it asserts or implies that some group can be identified as falling below that minimum; it may tell how that group is to be identified. Third, it sets up or implies some concrete program for aiding that group to reach or approach the minimum standard. Obviously, there is no magic in such a definition. A wage and hour law would not fit nicely under this definition. The definition is not meant to be a badge of praise. It is only meant to set apart and describe an important group of laws. Having done so, it is easier to ask whether these laws have significant traits in common, whether they form a useful and separable field of study.

Under the definition, public assistance would be a model social welfare program. The Wisconsin statute, for example, defines as "dependent" persons "without the present available money or income . . . or other means . . . sufficient to provide . . . necessary commodities and services," food, clothing, water, medical attention, and shelter.[8] The statute sets up a minimum standard, access to "necessary commodities and services." It identifies a group that falls below this standard. And it sets up a program to help them rise to the standard. Public housing laws fit with only a touch more of difficulty. The minimum standard is a decent place to live. The class of potential beneficiaries are "persons of low income," who cannot afford a decent home on the private market. The program is to build houses and rent them at low rents to these people.

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[8] Wis. Stats. §49.01 (4), (1).

Public assistance and public housing are close, then, to the model social welfare law under this definition. Other laws, some of which are commonly described as welfare laws, do not fit nearly so well. An important case is social insurance. This term is applied to the old age program under the federal Social Security Act and to workmens' compensation, among others.[9] Basically, old age provision of the federal law taxes employers and employees; builds up a fund out of the proceeds; and pays monthly pensions to participating workers when they reach retirement age and leave the job market.[10] Does this program fit the definition? Perhaps elderly workers form a needy class. Perhaps the law implies some minimum standard of security in old age. But the law covers those who need benefits as well as those who do not. One might wish to stress the preventive aspect of the law. The theory might be that the system will prevent destitution and poverty in old age. The law, one hopes, will raise the standard of living and add to the general good. But in structure the law is not a clear-cut example of social welfare legislation, as we have defined it.

A distinction can therefore be made between programs of "pure" welfare and programs of social insurance. The "pure" welfare program is curative; social insurance is preventive. A curative program fits the definition given here much more easily than a preventive program. This does not mean it is more effective or a better program. One would hate

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[9] On the definition of this concept, see D. Gagliardo, American Social Insurance, (revised edition, 1955) 14-23.

[10] There are, of course, many other aspects to this law. Widows of workers, for example, may also collect pensions. These aspects are not crucial to the discussion in the text.

to have to argue that the old poor laws were pure welfare laws, and that modern social insurance was somehow much inferior. The distinction between curative and preventive laws is only one of a number of distinctions that can be made between programs, in such a way as to organize them around the definition, in terms of closeness or remoteness of fit. In the following pages, many such distinctions will be made. Out of these distinctions, we will build one or more competing models of social welfare legislation. We will also try to show, or guess at, the relationship between the political background of social welfare law, and the precise shape these laws tend to take.

II. The Minimum Standard

We have defined social welfare legislation as legislation which, among other things, sets up some minimum standard against which to measure the need of some group of people. The standard, of course, can be implied in the law, or spelled out in great detail. In the public assistance law, as we saw, the standard is that minimum level of income and resources on which a person and his family can live.

We cannot, in any detail, go into the question of the source of the standard. Obviously, it varies from time to time and from society to society. What people in the United States consider poverty would be almost affluence in most of Asia. A minimum level of public health includes smallpox and polio vaccination. It does not (yet) include access to heart transplants, kidney machines, or psychoanalysis. Cost and the level of technology are powerful influences on the minimum standard. What people consider to be an acceptable minimum lies in the zone between what is barely possible for a society to afford and what is easy

for a society to afford. What is impossible is out of the question (free trips to the moon for all). Free psychoanalysis for the poor would be enormously costly, and would strain existing stocks of analysts; it is an unlikely program even if most people were convinced it was a good idea in principle. Of course, what a society can afford is, within limits, a matter of social opinion, not of absolute fact. A society which cannot (it feels) "afford" to give jobs to the unemployed finds that it can afford to spend billions on a distant war.

In many welfare programs, the base against which the minimum is measured is a general standard for all beneficiaries. Or the beneficiaries may be grouped into very broad classes. Obviously, there is a single standard for certain kinds of medical care: everyone is entitled to a free vaccination against smallpox. The various schemes for a guaranteed wage or a negative income tax assume a single standard of income, for a particular family type.[11] All families of four--husband, wife, and two children--would be treated roughly alike. The standard, in other words, is a floor--a true minimum.

There are some programs, however, which measure the minimum standard in a different way. The standard is the prior position of the particular beneficiary or class of beneficiaries. For one reason or another, the beneficiaries have fallen from an economic or social position they once held. What the program does is restore the status quo. We might call the standard in these programs restitutionary. Disaster relief programs have a strong restitutionary flavor. For example, the Disaster Relief

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[11] The literature in these proposals is already very large. A brief account is in C. Green and R. Lampman, "Schemes for Transferring Income to the Poor," Industrial Relations, Vol. 6, p. 121 (1967).

Act of 1966[12] provides help for various classes of sufferers from the effects of natural catastrophe. The Secretary of Agriculture is given power to adjust payment schedules of farmers who borrowed money under the Rural Electrification Act. Housing loans can be extended, veterans' loans refinanced. Farmers may borrow money to replace damaged facilities. What these provisions aim to do, in a small way at least, is reconstitute the pre-existing state of affairs. An earthquake might reduce a city or a neighborhood to rubble. A flood might destroy crops and farm equipment. Without insurance, major disasters can reduce those they touch to a single state of poverty. The government, confronted with the situation, might conceivably have done no more than provide general relief. This would have brought the sufferers up to a single minimum level. But disaster relief takes a different path. It attempts to restore to each individual his position before disaster struck. A farmer whose farm is flooded is treated as a farmer; he is not treated as a general indigent, even if technically that is what he is for the moment. Disaster relief, in other words, is a kind of public insurance. The costs of the insurance are borne by the government. And the amount of the insurance depends on the position, the occupation, and the net worth of the insured. Benefits, in short, are not uniform. They are geared to need, which in turn is partially measured by affairs as they were before disaster. The use of a single uniform benefit can sometimes achieve the same result. A mortgage moratorium during an economic depression,[13] or a wartime moratorium on

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[12] 80 Stats. 1316 (1966)

[13] See, for example, the Home Owners' Loan Act of 1933, 48 Stats. 128 (1933)

debt collection, provides relief to debtors, regardless of the size of their debt. The small farmer and the small home owner is protected with regard to his small farm or home; the big home owner and the big farmer with regard to his interest. If there is an upper limit on the size of the debt, this effect will be dampened. A great deal of the New Deal program for agriculture was restitutionary. Big farmers benefited far more than small farmers. The same principle was carried on in farm legislation in the post-war years. Even the concept of parity is restitutionary. There are restitutionary elements in many other programs. Pensions and social insurance programs are restitutionary if benefits are not measured by need, but by contribution. The old-age pensions under Social Security were so set up that the more you earned, the more you received, at least up to a point. Veterans' benefits are restitutionary in a rather subtle way. Particularly after the second world war, Congress created a large basket of benefits for veterans. This "GI Bill of Rights" included a free college education, home loans, and business loans. The benefits were available equally to any veteran. Yet in fact these benefits could be expected to benefit some much more than others. The tuition benefits and living expenses helped most those whose background, skill, and inclinations made them already good college material. The law, moreover, presupposed, strengthened, and reconstituted an educational system which had been only interrupted by the war. In fact, the law had enormous consequences. It vastly expanded the college population. Hundreds of thousands went to school who would not otherwise have gone. Some of this impact was unforeseen. And the result should not conceal the faintly restitutionary aspect of the program.

Wars, disasters, and depressions seem to give rise to restitutionary programs. These are events usually thought of as emergencies -- interruptions of what is assumed to be the normal state of society. More important, they are events which cannot be blamed on those who suffer the consequences. Veterans, indeed, are heroes. Pensions, on the other hand, are given to people who have simply gotten old. Getting old is not only normal, it is inevitable.

There seems, then to be a connection between the source of the deprivation and whether or not the standard has restitutionary elements. The source is inevitable in one of two senses -- that it comes, like old age, to everyone or that it comes unavoidably to a few. To put it another way, is the source of the deprivation in any way the fault of potential beneficiaries? Obviously, fault is hard to attribute to the victims of floods, fires, and hurricanes or to people who have grown old. It is, alas, quite easy to treat the victims of urban poverty as somehow at fault. American welfare legislation is scarred with the results of this attitude which lives long and dies hard. The attitude makes it easy to justify setting the level of benefits at a bare minimum. To the public, or part of it, deterrence and incentive are critical questions. Nobody can accuse people of fomenting a flood to get on the federal dole. Veterans do not start the wars they fight. Farmers do not bring on depressions. Teachers do not conspire to grow old. Hence, no one can argue that making benefits high will encourage recipients to look for deprivation and bring it about.

Fault, in other words, is a central concept in welfare law, as it is in the law in general. And we have suggested, as a rough equation,

that restitutionary standards are associated with a fault-free source of deprivation. Conversely, if the source of deprivation is not fault-free, the standard tends not to be restitutionary. Absence of fault has been a critical concept in the law of torts. This is the body of law that deals with claims for reparation for injuries imposed by one legal entity on another. A person injured in an "accident" can recover only if the injury was caused by negligence, that is, blame-worthy conduct. The plaintiff himself must be free from fault. In legal language, he must not be "contributorily negligent." If the plaintiff did contribute to the accident, he recovered nothing. Of course, if plaintiff could not work and was penniless, he was entitled to relief. Hence the system had two parts, one restitutionary, the other not. Through tort law, a man struck by a railroad car might recover his "full" damages, including loss of actual and potential earnings. But to do so he had to be himself fault-free. If he was, the measure of recovery was restitutionary: a rich man recovers more than a poor man. But if he was not fault-free, he lost his right to restitution. All he could claim was the non-restitutionary benefits of poor relief.

In industrial accident law, ordinary tort law proved to be unsatisfactory; and in the early 20th century it was largely replaced by a social insurance scheme, workmen's compensation.[14] Workmen's compensation itself is strongly restitutionary. It marks an advance over the common law tort system by eliminating fault as an element in determining whether the

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[14] See L. Friedman and J. Ladinsky, "Social Change and the Law of Industrial Accidents," 67 Col. L. R., 50, 69 (1967)

company must pay; but it does not eliminate entirely the element of the workman's fault. If he was guilty of some kind of gross misconduct, he forfeits his benefits. The system itself is strongly restitutionary. Recovery is essentially based on lost wages, and lost wages vary with the earning power of the worker. Outside of the industrial setting, the major staple of ordinary tort law is the automobile accident. Here fault remains an important concept. Many scholars would like to replace the present system with some kind of compensation scheme. But even those who want to make defendant's fault irrelevant do not argue that fault on the part of the plaintiff must also be irrelevant.[15]

Fault, of course, is not a concept with a clear, objective meaning. Fault is a social perception, and it changes over time. In the past, for example, people considered the drunkard as a weakling or a sinner. Today people are told that alcoholism is really a disease. If so, it is not really the drunkard's "fault." Changing ideas of fault are bound to affect the nature of welfare programs. Floods, earthquakes, tornadoes, and the miseries of war are most clearly not anyone's fault; hence relief measures are strongly restitutionary; similarly, blindness and most physical disabilities are fault-free, and aid to the blind has distinct restitutionary features. Many people, however, attribute fault to the victims of simple poverty. They imagine that many of the poor are poor because they are lazy or ignorant or inferior. They have somehow chosen or deserved their fate.

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[15] See, for example, Marc Franklin, "Replacing the Negligence Lottery: Compensation and Selective Reimbursement," 53 Va. L. Rev. 774, 788-790, 801 (1967)

The line between the concept of fault and the kind of standard is, of course, a theory of deterrence. If a deprivation is due to inferiority or fault, it must differ markedly from a program for blameless, ordinary people. People must be prevented from choosing deprivation deliberately. That would raise costs and aggravate whatever the social problem is. English poor law history is almost paranoid on this subject. Nothing must be done to encourage pauperism. The idea is that if relief is made too attractive, men will quit work and live on the dole. Hence, a non-restitutionary standard is apt to be a very bare minimum.

The point can be illustrated by unemployment compensation. This program has marked restitutionary features. It proceeds on the assumption that people can lose their jobs for reasons that are not their fault at all. They must, however, continue to look for work. And after awhile, the benefits stop; the worker, if he has no resources and is still unemployed must then go on relief. Otherwise, there would be too strong an incentive to live on the dole.

Actually, not very much is definitely known about the incentive problem.[16] But <u>belief</u> in the incentive problem is a political fact of major importance. This belief has scarred welfare programs for centuries. Programs for the fault-free are much more apt to win sympathy: who can resist aiding the blind? Or innocent children? The dilemmas of AFDC come, in part, from the fact that there are two sets of beneficiaries: the mothers, who are widely believed to be vicious and immoral, and the children, who are inherently innocent and fault-free. The political

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[16] See H. Kasper, "Welfare Payments and Work Incentives: Some Determinants of the Rates of General Assistance Payments," <u>Journal of Human Resources</u>, Vol. III, p. 86 (1968).

power of restitutionary programs arises as much out of interest as out of sympathy, however. Anybody can be victimized by a flood or some other catastrophe, including war. Hence it is possible, politically, to persuade broad groups of people that costs of restitution should be socialized. Besides, many restitutionary programs -- farm subsidies, for example -- have a powerful interest group behind them. Programs for the very poor have no such advantage.

III. Finding the Beneficiaries: Eligibility for Relief

Welfare programs must have some way to define the class of beneficiaries, and set up standards of eligibility. Eligibility rules lay down general standards for identifying beneficiaries. There are also rules of process for testing individuals against these standards. Laws very typically set up these standards and tell people how to claim their eligibility. Laws also define the legitimate range of responses of relevant legal authorities to steps taken by applicants. The Wisconsin statute on aid to dependent children, for example, contains a definition of a "dependent child." He is

> a child under the age of 18, who has been deprived of parental support or care by reason of the death, continued absence from the home, or incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousins, nephews or nieces in a residence maintained by one or more such relatives as his or their own home, or living in a residence maintained by one or more of such relatives as his or their own home because the parents of said child have been found unfit to have its care and custody, or who is living in a foster home. . .[17]

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[17] Wis. Stats. §49.19 (1) (a). (1965)

Other criteria are also spelled out. The child must fulfill residence requirements; his needs must be more than temporary; there must be a "fit and proper" person who can have custody of him. The statute then describes the procedures that must be followed by someone who wants to claim aid. An application "shall be made on forms prescribed by the department" of public welfare [§49.19 (1) (b)]. The statute, thirdly, addresses itself to the authorities and tells them how to respond. A "prompt investigation of the circumstances of the child shall be made . . . before granting aid;" a "report upon such investigation shall be made in writing and become part of the record;" the applicant shall be "promptly notified in writing of the disposition of his application;" if an applicant turns out to be "eligible," then aid shall be furnished "with reasonable promptness." [§49.19 (2)] Some statutes define the various aspects of eligibility with great care and detail. Others leave to subordinate agencies the job of making the standards concrete. And, of course, here as elsewhere, actual practice may differ greatly from the law on the books.

(a) Identifying the beneficiaries: the means test.

Any conceivable social welfare law uses some sort of test to identify beneficiaries. Even if the government decided to make a flat grant of $10 to every man, woman and child in the country, there would likely be some process to follow, in the course of which men, women, and children could be screened out from cats, dogs, foreigners, and people who had gotten their money already. In order to receive veterans' benefits, a person must show that he is a veteran. To receive aid to the blind, a person must show that he is blind.

In most cases, eligibility provisions are not particularly controversial. But the so-called means test was the subject of a bitter debate during the political struggle over medicare. To English liberals, too, the means test is a fighting phrase. The debate, in large part, is a debate over the size and definition of the class of beneficiaries. Medicare is essentially a social insurance program; its benefits interlock with those of "social security;" and the whole enormous army of old people who are eligible for OASDI would be eligible for medicare too. Those who were against medicare advanced their own proposals from time to time. These were typically "means test" plans, which restricted medical aid to people who were poor. One such plan was actually adopted in 1960, under the Kerr-Mills bill.[18] And when medicare was finally enacted, a program of aid for the medically indigent ("medicaid") was passed along with it.

The struggle over the means test was not a struggle over whether members of the class would have an absolute right to benefits or not. That was, in either case, conceded. The struggle was rather over two aspects of the eligibility process.

The means test means, first, that a beneficiary must fit himself into a category that carries with it what he or others feel is a social stigma. Second, officials investigate or verify eligibility in an oppressive and burdensome way.

Both aspects of the means test figured in the debate over medicare. Proponements of medicare assumed that, in our society, it is degrading to have to prove that you are poor. They did not want to vest power in

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[18] 74 Stat. 987 (1960)

the bureaucracy to meddle in people's privacy, checking to see if they really were poor or not. Social insurance programs do not require beneficiaries to prove poverty. People do not have to pauperize themselves to be eligible. These programs do not carry with them any stigma. A person can clip coupons and still receive social security. Even the wealthy accept, without question, their benefits. This was the model held up by those who fought for medicare. And what they feared was the evil model of AFDC and general assistance. They wanted to avoid paupers' oaths, staffs of investigators, and midnight raids on homes to determine if a wage-earner was hiding under the bed.

Oppressive conditions, of course, are not inherently part of a program restricted to the poor. There are proposals to humanize AFDC and general assistance. Without changing the definition of eligibility, one can still alter the process of eligibility. The investigations and the spirit of suspicion can be altered. Nonetheless, there are enormous political difficulties standing in the way. The difficulties stem, at least in part, from widespread fear that making welfare easier will induce people to swarm out of the productive sector of the economy into the indolence of government support. These judgments are exacerbated by America's racial problems. The most notorious of the poor, at least currently, are the Negroes jammed into the big city ghettoes. Many whites are deeply convinced that Negroes are culturally or biologically inferior to whites. And this inferiority carries with it harmful traits that make it necessary to keep the Negro under close control. It has been said that modern American poor laws are more vicious and paternal

than those of any other advanced industrial country. Perhaps race prejudice must carry much of the blame.[19]

At any rate, it is difficult to humanize laws for the poor in any direct way. These laws, however, can be humanized indirectly, by increasing the size of the class to be benefited. There are many programs, which lack a means test (in the popular sense) -- and in which the threshhold of eligibility does not coincide with the limits of the class which "needs" the program. Some benefits go to people with a higher standard of living than the implied norm of the program. Under the "GI Bill of Rights," the government paid the college tuition of sons of millionaires. Public education, in general, is of this nature. The schools are free for the poor, but also for the rich. People with vast dividend income collect social security payments. Old people and blind people are entitled to an extra personal income tax exemption; this benefit is regressive, since the benefit is highest to people in high tax brackets; and those with tiny incomes gain no benefit from the exemption at all. Of course, in one sense the norm or standard in these programs is not poverty -- to be old, or a veteran, or blind is defined as deprivations in themselves. Yet these programs do not and cannot restore youth, good eyesight, and the lost years of the veteran. They act

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[19] Inferiority must not be confused with dependency. Children are dependent but not inferior. Children are looked upon as innocent and lovable. It is easier to win support for programs to benefit children than for comparable programs that help out poor or deprived adults. Middle class whites seem to identify and sympathize with children; their moral code demands, however, that adults be held accountable for their voluntary acts. Perhaps equally important is the fact that children are not feared. They do not constitute a threat to society. The threat comes, if at all, from what neglected children grow into. Teen-age children, however, though legally minors, are adult in their capacity to frighten the middle class. Some of the inconsistencies in juvenile justice may stem from this fact.

as if income and opportunity loss were the problems to be remedied. Some welfare programs frankly hand out benefits to a much larger class than the needy. The common European program of family or children's allowances is one of these. Some have proposed such a program for the United States. Obviously, most people do not need a children's allowance; and the government would take away in taxes more from these people than it would give them.

It is possible to criticize all these programs on welfare grounds. If people who can afford goods and services get them at government expense, public funds are (arguably) wasted. There are considerations of policy and expediency on the other side, however. First programs gain political strength if they benefit more, rather than less of the population. Social welfare programs are controversial. They stir up hostility and opposition. To stand any chance of adoption, their proponents must make compromises and concessions. One form of compromise is to diminish a program: scale it down in dimension and cost. Another form is to increase it in such a way as to buy additional support. The increase may be in the geographical range of the program as well as in the size of the class. Few government programs give out their money in accordance with a pure, directive definition of need. Public housing money, for example, does not go where it is most desperately needed. If it did, the limited amount of money might be best spent in New York and a few other old and crowded cities. Urban renewal money too might be best spent making an impact on New York, Chicago, and Philadelphia, rather than spread out thinly in hundreds of cities. But Congress would never agree. Why should a congressman from Iowa vote away his constituents' money to help out three far-away cities? Federal programs (and

state ones) usually reflect a complex kind of internal log-rolling. Small towns and suburbs get their share of housing money. Aid for Appalachia is followed by other "area" programs, until one or more such programs affects the majority of the states. The process is essentially the same as that which inflates the class of beneficiaries. Social security, veterans' benefits, and medicare are therefore spread out to a larger number of people than those who need the money. Otherwise these programs would never have been as popular as they are.

Also, programs without the means test do not have the appearance of charity. This too is of the highest political importance. It is especially important when some or all of those who are to benefit do not identify themselves with "the poor," even though they themselves are poor in the money sense. There has been much discussion whether there is such a thing as the "culture of poverty." Are there cultural or psychological characteristics that set off the poor from the middle-class, apart from effects due purely to low income?[20] However this question is resolved, no one can deny that low-income families come in various types and shapes. The Negro AFDC family, headed by a mother, and living in the big city slums is one type; there are other types that form what one might call the submerged middle-class.[21] These latter have the cultural traits of the bulk of the American middle-class.

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[20] See, for example, the discussion in S. M. Miller, F. Riessman, and A. Seagull, "Poverty and Self-Indulgence: A Critique of the Non-Deferred Gratification Pattern," in L. Ferman, J. Kornbluh, and A. Haber, Poverty in America, A Book of Readings, (Ann Arbor, 1965) 285.

[21] For the term, See L. Friedman, Government and Slum Housing (1968).

They are like their middle class neighbors in every regard except their income. Elderly whites, who live on pensions, are frequently of this type. The middle-class poor (if one can call them that) are anxious to be kept separate from the "true" poor. The middle-class poor have also tended to be more politically aware and articulate than the ghetto poor (at least up to now). Their wishes are consequently more likely to be reflected in law. If the middle-class poor are to benefit from a program, they set up and demand fair and easy treatment. And the demand is far more likely to be met than if the program deals only with the ghetto poor.

Excess benefits can also be justified as a matter of simple convenience. If most blind people are poor, if most elderly people have low incomes, if most veterans cannot afford to go to college, it may be simpler, even cheaper, to award benefits as of right to all members of the class, ignoring the fact that some benefits leak out to those who, strictly speaking, do not need them.

The means test, then, is associated with programs that benefit persons of inferior social position. These are people with very little political power. Those who administer the program tend to look down upon them; they are not <u>clients</u>, but <u>subjects</u>. Hence, they are vulnerable not only to the whims of administrators, but also to the whims of legislators. The poor make excellent scapegoats. Congressmen fulminate against welfare frauds and chiselers. In times of financial stringency -- which is practically always -- the programs for the poor are among the first and the simplest to cut. Indeed, for unpopular programs, the means test serves as a device to save money. It is a way of making welfare unpleasant.

These programs of charity in this regard are the exact opposite of the programs that lack a means test and which benefit a class larger than the class of the needy. Annoying and tyrannical conditions will keep some people from applying for benefits, even if they are theoretically entitled to them. This was clearly the point of some of the restrictions built into nineteenth century poor laws. People had to be taught, through a kind of legal shock treatment, that it was painful to be on the dole. It had to be a last resort. Welfare is still odious today. There are, moreover, many provisions built into law, whose aim is to reduce the class of eligible beneficiaries, below the number who "need" the program. Residence requirements are an obvious example. Many states seem deathly afraid of attracting poor persons who wish to take advantage of the welfare laws. Residence requirements will keep these people out, it is felt. They are therefore important cost-cutting devices. Onerous conditions, formal or informal, cut costs in another way: by raising the price (psychic or otherwise) of seeking welfare. Hopefully, then, some potential beneficiaries will be induced to stay out of welfare.

One long-term result of these facts is the kind of polarization of welfare programs. It may happen that a genuine demand for a welfare service arises in a "middle-class" population. This population will insist that the onerous conditions be removed. Usually, this takes the form of an entirely new program. Unemployment compensation, old-age payments under social security, medicare -- these are examples of non-charity programs which have been segregated out of the general system of poor relief. In general, they lack onerous conditions, and they carry

little or no stigma. For those who do not qualify, or for whom these programs do not bring in enough -- the hard-core poor, in other words -- are still covered by the residual programs. But these programs have now lost much of their "middle-class" customers. Along with them, they have lost whatever political appeal they might have had, and much of their protection against excess in administration.

(b) Entitlement: Eligibility as a right

Programs can be classified by whether eligibility is or is not a matter of right. In practice, a right to eligibility means the following: first, if a beneficiary follows the rules for claiming a benefit, and can fit himself in the legal definition of a beneficiary, the officials in charge have no discretion to withhold his benefit. If they refuse, he may appeal their decision and if necessary go to court. Second, the quantum of benefits is as great as the number of potential beneficiaries. If the number of beneficiaries is unlimited then the quantum of benefits is also unlimited -- at least in theory. It is part of the nature of a right that the number of units of right is not rationed. Theoretically, government stands ready to ensure an unlimited supply.

There are many programs where the number of potential beneficiaries far outnumber the units of benefit. This usually means that officials select at their own discretion among potential applicants. The essence of discretion is lack of outside control over decisions. The committee which chooses the winners of the Nobel Prizes is in this position. There is only one prize in each category and many potentially eligible people.

No one has any right to the prize. No one can attack the committee's use of discretion. No one can sue the committee for failing to choose him. At most, a person might be able to show that he was a fit person to receive a prize. He might be able to show, too, that the committee made an unfair and improper choice. But he could not establish a claim to the prize unless he could also show that no one else was in the class of the eligible -- an impossible job. Hence we say, and quite properly, that no one has a right to the prize.

Compare the position of a person who would like to live in a public housing project. There are many more low-income people who qualify than there are apartments in public housing. Local housing authorities have had enormous discretion to choose among applicants. Federal and state statutes set down only very vague guidelines.[22] Consequently, no potential tenant had a right to a place in any project. Nor did poverty give any particular person the right to an apartment anywhere.

There has been a great deal of agitation lately about the "rights" of public housing tenants; tenants have struggled for and won some of these "rights." But it is important to understand what has and what has not been achieved -- and what can and what cannot be accomplished in the struggle. The tenants have complained about excessive management power. Big city public housing, since the "middle-class" poor have left it, has become the home more and more of low-income Negroes. The program became something of a welfare pariah. The more it was despised, the more

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[22] 42 U.S.C. §1402; See L. Friedman, "Public Housing and the Poor: An Overview," in J. Ten Broek, ed., The Law of the Poor (1966) 318, 332-340.

conditions fulfilled the prophecy of disgust. Recently, however, tenants in some places have organized (or been organized) to ask for changes. They have waged sit-ins, and fought their public landlords in court. They have won some procedural concessions. The most important of these are rights to a hearing, rights to fair and impartial determination of eligibility, protection against arbitrary eviction, elimination of obnoxious rules and regulations.[23] But no one has gained any right to public housing. All that has been gained is a certain amount of control over the discretion of management. It is true, that many public housing authorities have established formal rules of priority. Some state statutes require them too. Poor persons displaced by urban renewal, for example, have high priority. There may also be rules that give priority, within a class of eligibles, to the family that first got on the waiting list. When this is true, a particular family may have a right to the next available apartment. If he is passed over in favor of a person with lesser priority, he can demand that the Authority follow its own proclaimed rules. His right, however, is not a right to public housing, but a right to specific treatment under specific conditions. And that right is, like all rights, reviewable, and like all rights, it is available (theoretically) in unlimited supply. There is no limit to the "units" of administrative fairness.

Procedural rights are important, if limited. Other things being equal, a government agency prefers to work with as free a hand as possible.

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[23] See, for example, Thorpe v. Housing Authority of Durham, 35 U.S.L.W. 4366 (April 17, 1966); 8 Welfare Law Bulletin (May 1967), 3-5,6-7.

It dislikes external controls. The less controls, the greater the autonomy of the agency, which is a sign of political strength or public indifference. Additional procedural rights and controls can only be gained by political means. These include lobbying for laws, protest activities and sit-ins -- and lawsuits as well. Therefore, even the demand in a lawsuit for what appears to be hollow procedural rights is immensely valuable as a strategy in the struggle for substantive benefits. Lawsuits by tenants must be looked at in this light. It would be foolish to spend time and money on lawsuits, if all they accomplished was to make officials change their procedures in the direction of more elegant oppressiveness.[24] This seems to be all that can come out of a lawsuit against public housing administrators. They will retain tremendous discretion in any event simply because there are only a limited number of units of benefit. The lawsuits are moves in a game of pressure and counter-pressure, however. They are, in form, lawsuits by private persons; yet many are backed by tenant unions, civil rights groups, or local arms of OEO action organizations. Litigation is far more likely to bring about real change under these circumstances, than if a lawsuit represented one lonely individual, swimming against the tide. A class action adds to its own force the political power of a social movement. The lawsuit is only one visible, external sign of social pressure. Management may be induced or coerced to change far more than the precise policy under attack.

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[24] See, in general, J. Handler, "Controlling Official Behavior in Welfare Administration," in J. Ten Broek, ed., The Law of the Poor (1966) 155.

Nonetheless, the limit to the supply of benefits is a critical factor that influences the nature of the program. Welfare programs range from extreme discretion to those in which eligibility is a firm, solid matter of right. The range parallels roughly the range from non-restitutionary to restitutionary, from "charity" to "middle-class" programs. There are important exceptions which will be mentioned later. And, of course, here as elsewhere, it is necessary to distinguish between the formal and informal level of analysis. Discretion is never truly unlimited. There seems to be no formal restraint on the President's power to choose his own personal staff. Yet even this power is hedged about with practical political restraints. At the other extreme, infinitely more "rights" are floating in the air (so to speak) than people can really take advantage of. Ignorance and timidity rob many people tf their "rights." Some people are simply too proud to go on welfare. Oppressive conditions may drive people away -- perhaps deliberately. Corruption, incompetence and illegality take a further toll of rights. Sheer terror has kept Negroes from voting in many parts of the South.

Many social welfare and allied programs, however, fall heavily on the "rights" side of the continuum. Among them are veterans' benefits, unemployment compensation, and old-age benefits under the federal Social Security law. Rarely are the rights technically absolute. Occasionally, it becomes glaringly clear that this is the case. In Flemming v. Nestor,[25] decided in 1960, the United States Supreme Court flatly held that

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[25] 363 U.S. 603, 4 L. Ed. 1435 (1960)

old-age benefits under the social security act were not "accrued property rights." Congress in 1954 had amended the Social Security Act to cut off old-age benefits for communists deported from the country. Nestor, a deported Communist, had paid his payroll taxes in the United States from as early as 1936. Until 1954 -- 18 years after he began making payments -- the Social Security Act contained no restriction on payments to deported Communists. Nevertheless, the United States Supreme Court held valid what Congress had done in 1954; and Nestor forfeited his Social Security benefits.

Flemming v. Nestor was decided by a bare majority of the Court. Perhaps the Court would not allow such a result today, in the same situation. But the case has never been overruled. The courts have often reaffirmed the idea that social security benefits are not vested or property rights. Congress clearly wants to be able to cut off benefits to unpopular beneficiaries, or for reasons of strong national policy. The 1967 Social Security Act took steps to cut off benefits for certain old-age pensioners who live outside the country,[26] and to make it more difficult for others to keep their benefits. Congress also wants the power to manipulate the level of benefits. Benefits so far have only gone up; but they could no doubt be lowered if it was absolutely vital.

Nevertheless, for all practical purposes, a person who meets threshhold requirements has a firm right to social security benefits. This will continue to be true at least for political reasons. But legal rights are also quite solid. There are fairly clear-cut criteria of eligibility

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[26] P. L. 90-248, 81 Stat. 821 (1967)

and they can be enforced against the administrators. Sometimes there is an honest dispute over whether an applicant meets eligibility requirements. Applicants have appealed to higher officials, or to the courts and won their cases.[27] Government also stands ready to increase the supply of benefits for all who are eligible and who apply. Practically, this means that the government would, if necessary, levy new taxes to pay for benefits that people expect and are entitled to by law. But what makes old age benefits a right is the fact that short-run fluctuations in demand have no effect on eligibility. Nobody is turned away from the local social security office because the supply of benefits has been exhausted.[28]

In other programs, eligibility is selective. In public housing, the supply of benefits is smaller than the number of eligibles. Officials must choose among beneficiaries. Sometimes the supply is not fixed; but government reserves the right to make choices, and denies anyone the power to review its decisions. The government, for example, can give out a few, many, or no medals, and it has nearly absolute power to decide who gets medals and who does not.

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[27] This is not to say that the remedies are necessarily either practical or adequate. Appeals are costly and slow. In some areas, access to the courts is limited. There are internal appeals within an agency, but no higher. Courts, for example, cannot exercise much judicial review over denial of veterans' benefits. Instances of unfair treatment have apparently occurred. See F. Davis, "Veterans' Benefits, Judicial Review and the Constitutional Problems of 'Positive Government,'" 39 Indiana L. J. 183 (1964)

[28] Benefits, however, do depend upon appropriation of money. There have been occasions when a legislature fails to act in time. Civil servants miss a paycheck, welfare clients get their money late or never. This amounts to a partial destruction of the "rights." Yet, win or lose, all of the eligibles are treated as equally entitled or not entitled to a unit of benefit.

Units of public housing and medals share a common trait in that they are indivisible; they cannot be further broken down. A one-fifteenth share in a medal or an apartment in public housing is unthinkable. Actually, every eligible person could be given a right to public housing, even if the supply were not increased. The benefits might simply be divided into smaller and smaller segments; and every beneficiary would have the right to (say) a few square feet of public living space. In the Soviet Union, living space is in very short supply, yet the right to an apartment is guaranteed; consequently, apartments are broken up into very tiny units. In the United States, however, this alternative is out of the question. One supposed advantage of public housing over slum life is that it eliminates overcrowding.

The value of prize, gift, or medal would be nullified if all potential beneficiaries shared in it. Pilot or demonstration programs are also treated as indivisible. They would lose their point if they could not be massed against one problem or limited to one area. In the choice of pilot or demonstration programs, formal discretion of administrators is at its highest. This is another consequence of treating these benefits as indivisible. It is not accidental.[29]

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[29] A different distinction between divisible and indivisible benefits is made by Robert Dahl in his book, Who Governs, p. 52. Dahl defines benefits as divisible if "they can be allocated to specific individuals;" jobs, contracts, and welfare payments are divisible. Parks, playgrounds, and schools are indivisible, since they "cannot be or ordinarily are not allocated by dividing the benefits piece-meal and allocating various pieces to specific individuals. With indivisible benefits, if one person receives benefits, many others necessarily must also." In our terminology, however, rights to enjoy parks are divisible, rather than indivisible.

A benefit, then, can be a matter of right under two distinct conditions of supply: first, the government guarantees an increase in supply; or second, the government guarantees a right to share, that is, it stands ready to cut the benefit pie into as many pieces as there are claimants. At first, one is hard pressed to think of examples of this kind of divisible benefit. Actually, most fundamental rights have something of this nature. The right to vote, for example, can be analyzed from both standpoints. Each new person who reaches 21 and registers has the right to vote. The supply of voting rights, in other words, is infinitely plastic. Government simply grinds out as many new ones as there are new voters. But suppose we look instead at what one votes for -- A Congressman for example. If the supply of Congressmen remains fixed, an increase in the number of voters dilutes the "share" of each voter in the choice of a Congressman. Similarly, there are rights of access to public space, or to roam about on the public domain; the more people exercise the right, the less (in a sense) their "share" of the total good.

In fact, many governmental programs are divisible (and confer "rights) only on the assumption that many eligibles will stay away. The National Park system is a good example. Everyone has the right to travel to Yellowstone in summer. But if everyone did, something would have to give. The roads could not handle the traffic, the campsites would overflow, the staff would be overwhelmed. Perhaps this crisis is not so far off! Distance, cost, and the crowd themselves have helped keep Yellowstone manageable -- so far. As it is, campsites are rationed; rooms at the lodges have to be reserved in advance. Campsites and rooms at the lodge, in

other words, are treated as indivisible benefits, like units in public housing. The public has a "right" to fair procedures, but not a "right" to a campsite at will. If overcrowding continues, and new parks do not drain people off, perhaps even the right to drive through Yellowstone and look at bears will disappear.

Many paper rights are divisible only on the theory that they will not be so heavily used as to overload the system. This is true even of some very basic and divisible rights -- free speech, for example, and access to the courts. If everybody shouted at once, free speech might have to be limited to prevent us from going deaf. "Free speech" does not now include the right to run a television channel. These have to be rationed, or the airwaves would be a jumble of noise. If everybody sued everybody else for every technical violation of right, the court system too would collapse. In fact, an elaborate system of prices, rules, and burdens helps fend off this evil day. The costs of court ensure that the number of actual users falls far enough short of the number of potential users. The system, then, can continue as it is without major overhaul.[30] In criminal law every defendant has a right to trial by jury. But if all defendants took advantage of this, the court system would have to expand radically, or find ways to make trials quick and routine. Actually, there are relatively few jury trials. Most defendants plead guilty and prosecutors make concessions to induce them to short-cut jury trial.[31] Socially speaking, rights are available in

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[30] See L. Friedman, "Legal Rules and the Process of Social Change," 19 Stanford Law Review 786, 798-810 (1967)

[31] See, for example, the discussion in Abraham S. Blumberg, "The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession," 1 Law and Society Review No. 2, 15 (1967); Donald J. Newman, "Pleading Guilty for Consideration: A Study of Bargain Justice," 46 J. Crim. Law, Criminology and Police Science 780 (1956).

unlimited supply only in the short-run sense. Institutions are prepared to handle short-run fluctuations in demand. A sudden increase in demand strains those institutions which have to manage or give out divisible rights. Something has to give. This simple point is frequently overlooked. Those who work for full Negro rights, for equality of opportunity, in an ethical and legal sense, ask no more than the removal of barriers to rights which have always "belonged" to the Negro. But a whole social system has grown up in the assumption that Negroes stay put. The Negro demand for equality of treatment upsets strong social arrangements. It creates enormous hostility and dislocation; and will continue to do so as long as institutions are not adjusted to accommodate increase in the sheer volume of demands. Without these adjustments, rights are gained in a zero-sum game. Every new winner means a new loser. What could be the objection to a demand from the ghetto that the garbage be collected, streets repaired, schools be upgraded? In theory every citizen has an equal right to service. In fact the city spends only so much, and has only so much to spend in the short-run. What is spent in one area is taken away from another. The same problems arise in the struggle for equality of justice. Courts must be equipped to handle a greater work load and to deal with demands for a subtly different grade of justice. If institutions are not strengthened, the demands will be very hard to meet. Courts will feel forced to respond in such a way as to nullify progress or dilute its impact. They will evade the demands, or routinize the process of decision, or find some informal way to escape from their dilemma.

Welfare rights are a special problem. In general, entitlement is correlated with benefits that flow to a politically powerful and favored class. And yet, for centuries, there has been a right to poor relief. No doubt the moral notion that nobody should starve, regardless of their virtue or lack of virtue, is very strong. Poor relief, however, has usually been minimal and begrudging. It has been, as we noted, hedged about with onerous conditions. The result has been that many fewer persons take advantage of welfare than are by law entitled to do so. In fact, some militants have tried to mobilize ghetto Negroes to demand their full share of welfare. After all, despite the fact that people have "rights" to certain benefits, government must compute budgets and raise taxes; it does so on the basis of past expectations. The militants think -- quite correctly -- that a sharp escalation of legitimate demands would destroy the system almost as effectively as armed rebellion.

What the reaction of the white majority would be to these demands is hard to predict. The problem is that the rights have never been willingly bestowed. It is another case of excess benefits. Benefits go to those who do not "deserve" them, in the view of some part of the public. They grudgingly agree to an overflow of rights, either because of some higher morality (religion or the Constitution), or for social cost reasons (to prevent fires, plagues, crime or rebellion), or for administrative convenience. But there is a certain political and social instability. The concept of right is heavily freighted with moral overtones. The average man, then, understands the concept of free speech, more or less. But he may find it hard to see why it extends to Communists, atheists, or others who "abuse" it. The police, too, behave

brutally only toward those who do not, in their view, "deserve" constitutional rights. Informal, secret deviations from formal rights take place in this land of shadows, where legal rights extend beyond the limits of those who "deserve" to enjoy them. Much of the welfare system has huddled in these shadows for centuries.

(c) Eligibility and the Concept of Earning

Benefits are often divided into two classes, the earned and the unearned. Eligibility for many kinds of benefit is conditioned on earning the benefit. The worker pays payroll taxes -- in order to become eligible for social security. As he pays, rights accrue to him. The process is not completely different from the ordinary process of earning a salary on the market. A person performs certain acts which have a market value. He is then paid that value for having performed. Benefits are unearned if this market analogy does not fit. One does not "earn" the right to general assistance. A charity is, by definition, unearned. It flows from the goodness of the donor's heart. Eligibility and the amount of the benefit are related to need, not to the market value of anything the beneficiary has done.

But when people speak of a benefit as "earned," they do not necessarily have an actuarial or economic concept of earning in mind. Even the old-age benefits under Social Security are not so clearly "earned" in an economic sense. Amounts paid into the old-age funds of Social Security do not match the amounts paid out in terms of the principles applicable to private insurance or annuities. A worker, to be sure, must "earn" the right by working and paying tax for several quarters;

more quarters, however, do not earn more benefits. Of course, private insurance too is "earned" as soon as a single premium is paid. But the analogy to private insurance does not hold systematically for social security. The program is shot through with features that are based on policy, not economics. For example, "there is little or no classification of the insured into groups having similar risks." Also, "the cost to the individual is not proportionate to the probability of his incurring the risk."[32] The ceiling on benefits is also hard to relate to the concept of earnings. Under the law, workers who stay on the job when they reach 65, lose their benefits; this policy is hard to reconcile with the principles of private insurance.

In general, "earning" is not an actuarial or economic concept; it is psychological and political.[33] People commonly say that veterans "have earned" their benefits. Veterans have invested time and -- in some cases -- their physical well-being. These contributions to be sure, have a market value. They were in fact paid for. Veterans' benefits, however, are in addition to the salary of soldiers; and programs have sometimes been adopted retroactively. Veterans' benefits owe a great deal to a general public sense of moral obligation and patriotic fervor. They probably owe as much or more to the political power of veterans, their families, and veterans' organizations. In the American political system, any self-respecting group can justify benefits on some grounds other than charity. Farmers could and did construct elaborate arguments to show how and why they had earned the right to better

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[32] E. Burns, Social Security and Public Policy (1956). Mrs. Burns points out that the analogy to group insurance is much closer.

[33] See, in general, J. D. Brown, "The American Philosophy of Social Insurance," 30 Soc. Serv. R. 1 (1956).

prices for their crops. Veterans feel they have earned their benefits. So do those who receive social security payments at 65. This feeling is more important than whether, in an economic sense, the benefits really have been earned. An earned benefit does not carry with it any social stigma; an unearned charity does. There is no shame in collecting social security. The rich do so along with the poor. The right has been earned and is psychologically equivalent to an annuity, bought and paid for on the open market.

As might be expected, then, programs with "earned" benefits tend to be restitutionary, tend to avoid any means test, tend to cover more than those who "need" the benefits. The reverse is not always true. Disaster relief, for example, is restitutionary, but is not "earned" except in some very subtle sense. In general, though, programs with earned benefits fall heavily on the middle-class end of the continuum of welfare programs.

Some benefits have to be earned in a very literal sense. A beneficiary must make some contribution -- often he must work. Welfare theorists have swung back and forth on whether a quid pro quo should be required in exchange for benefits. Under older systems of public assistance, able-bodied paupers were required to work. This labor was not, strictly speaking, a demand that any benefits must be earned dollar for dollar.

To some extent, the policy was punitive; it was meant to make public relief unpleasant, keep people away from the relief rolls. To some extent, work policy was a cost-saving device. Work relief is still part of the law. In Wisconsin

> Any municipality or county required by law to administer relief may require persons entitled to a relief to labor on any work relief project authorized and sponsored by the municipality or county, at work which they are capable of performing.[34]

The myth that the relief rolls are cluttered with lazy louts unwilling to work is, alas, still very strong.

> When a group of 'welfare mothers' staged a sit-in on Capitol Hill . . . to protest relief restrictions, Senator Russell R. Long said angrily: 'if they can find time to march in the streets, picket and sit all day in committee hearing rooms, they can find time to do some useful work.'[35]

Added to such sentiments is the lingering hope of cutting costs, either by driving people away from relief or by earning a social product from the labor of the poor. Work relief was one of the infamous conditions laid down by Joseph Mitchell in Newburgh, New York, in 1961.[36] It remains a powerful daydream of the right.

Quite different is the demand for government-backed employment, or for public works projects, as a remedy for unemployment.[37] In depression times, the middle and working classes tend to demand benefits that are not pure charity. They want to keep their self respect. They want jobs, not hand-outs. The cry for jobs has also been sounded by some of the militant poor. Work relief was a very prominent feature of the New Deal program. It had a certain restitutionary character. Under the WPA program, artists painted pictures, and playwrights wrote plays.

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[34] Wis. Stats. § 49.05 (1).

[35] New York Times, January 29, 1968, p. 19, col. 1

[36] G. Steiner, Social Insecurity (1966), pp. 110-112.

[37] See Roger A. Freeman, "Public Works and Work Relief," in J. Becker, ed., in Aid of the Unemployed (1965) 173-192.

Those who were creative persons before the disaster struck were treated differently from the common run of man. But this was only part of the story. The politics of work relief certainly favored programs which looked as little like charity, as much like "earning" as possible. In addition, when men were matched to the proper job, the social gain is maximized. Those who defended WPA, and those who defend the job corps and similar programs, tend to stress the value of the product of the work. In the case of WPA, they argued that the benefits were truly earned.[38] Opponents of these programs, on the other hand, typically argue that the money is wasted; that these programs are merely charity in disguise.

IV. The Nature of the Benefits

Welfare programs differ greatly from one another in the characteristics of the benefits themselves. We will briefly discuss two kinds of characteristics: first, in the mode of computation and level of benefits; second, in the mode of distribution. The level of benefits can be figured in many ways. Benefits can be fixed on a per capita basis; they can be adjusted for family size; they can be made to vary by need; they can have a clear-cut floor or a clear-cut ceiling. They can be specified in statutes or rules; or they can be flexible, within the discretion of an administrator. Generally speaking, two levels of benefit can be distinguished. Many programs fix a minimum level. But

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[38] For the job corps, the major argument is one of social gain, rather than that the corpsmen literally earn their keep. The argument goes that society benefits when drop-outs are taught useful skills.

others fix a level of rehabilitation. These are concerned with preventing future deprivation as well as with curing present evils. Job retraining programs are of this type. Trainees are paid enough to live on; at the same time they learn skills which (hopefully) will enable them to become self-supporting. The distinction between the minimal and the rehabilitative can also be applied, more or less, to styles of administration. Prisons, public housing projects, and mental hospitals, can be custodial, that is, mainly interested in the physical storage of inmates; or they can have some more elaborate goal in mind -- treatment, social renovation.

To a large extent, the choice between styles of administration is forced down the throats of administrators by factors over which they have little or no control. If a mental hospital is hopelessly overcrowded, and the staff hopelessly small, how much "treatment" can realistically be done? Moreover, the issue is different for different institutions. There is no inherent inconsistency in arguing that prisons (for example) ought to do more for people but public housing authorities ought to stick to their housing and forget making over people's lives. Public education has no choice but to "rehabilitate." General assistance, on the other hand, could quite conceivably confine itself to giving out cash. On the whole, however, the argument over levels and styles touches on a basic issue. Some feel that, in general, rehabilitation is a screen for oppression. Man is still too ignorant to know how to mold people's lives. Others feel that massive social services are the only hope of permanent impact on the poor. Simple transfer payments will be wasted. One group is likely to call

for reform of institutions and more resources. The other is likely to call for the abandonment of institutional care. In welfare history, the pendulum of opinion has swung from one side to the other. Now indoor (institutional) relief is in the ascendancy; then outdoor (home) relief. In part the argument is over whether society should simply feed and clothe, or whether it should reform its poor; and where the reform can be best carried out. What prisons, public housing, mental hospitals, and schools can and ought to do is likewise subject to wide, wild swings of opinion. In the 1960's, a new wave of skepticism over rehabilitation underlies the movement for a negative income tax. This and other schemes of guaranteed income assume that the lives of the poor will be permanently improved by simple transfers of money. There is much less need to manipulate people than has been imagined. Permament improvement in the life of the disadvantaged will arise spontaneously out of money and what money can buy.

The unit of benefit can be computed in many ways. It may be useful, however, to distinguish between what we might call the resource and the value method. In one, the level of benefits is determined by the resources available. In the other, some judgment of value sets the level of benefits, and resources are made available to meet the need.

Actually, these are not two methods, but two aspects of virtually every program. The available resources cannot help but influence decisions about the level of benefits. On the other hand, value choices dictate whether society will strain itself and tax itself to make resources available.

Often the value choice comes first. It is decided that nobody ought to starve, that prisoners on trial for their lives must have access to a lawyer, that no one shall lack a smallpox vaccination by reason of poverty. These choices, of course, assume that the cost of fulfillment will not put a crushing burden on society. Sometimes that assumption turns out to be false. The medicaid program gave to the states the right to set levels of benefits for the medically indigent. The states then made value choices; they decided what kinds of medical benefits everybody "ought" to have. When this turned out to call for billions of dollars, a certain amount of backtracking set in. How different this is from the case of public housing! Here the initial yearly decision is not the number of people who live in substandard homes. The initial decision sets a number of units, and appropriates money for these units (and no more). The pie is then divided administratively among the various suppliant agencies. Of course, even here value choices enter in. No one can say that the country can only "afford" so many units. But only so many units are chosen, in competition with other societal needs or imaginary needs. And it is a value choice that the units will not be reduced below a certain size. We would rather leave some needs unmet than crowd everybody into a few public housing apartments; they would do, we think, more harm than good. In restitutionary programs, too, the value choice made is that the prior state of affairs is to be brought back into being; and this shapes decisions about the level of resources, rather than the decision going the other way around. If restitution turns out to cost far more than expected, of course, rethinking the value choice is bound to occur.

The mode of distribution is another significant feature of welfare programs. Some programs provide benefits in cash. General assistance, old-age pensions, AFDC, unemployment relief, the proposed negative income tax are all programs of cash transfer payments. Some programs provide for benefits in kind. Free lunch programs, food stamps, medicaid, and public housing are obvious examples. Most basic "rights" are rights in kind -- even free speech and freedom of religion. There are advantages and disadvantages to either form. Cash payments give the beneficiary great freedom of choice. Money can be spent as one sees fit. Gifts in kind can be more precisely geared to a specific need. A free lunch program is a much more direct way to improve the diet of poor children than cash payments to parents, even if the parents are told what to do with the money. Public opinion affects the choice of cash or kind. Unsupervised cash gifts raise the specter of waste. Money might be squandered on liquor, luxuries, and vice. The public does not look kindly on such expenditures -- at least by the poor and on government money. Gifts in kind are subject to much firmer control. The form of the benefit is important, too, in determining the ultimate indirect beneficiaries. Public housing construction is sure to make jobs for masons and plumbers. In the long run, a negative income tax might have the same effect or it might do more for grocers, tailors, and teachers. Every program of welfare in kind has a ready-made lobby of the non-poor.

Some benefits are voluntary, some are coerced. Society pretends that detention of juveniles and commitment to mental hospitals are benefits to people in trouble. In this sense, even prison can be called a

benefit. It is a place to reform and repent. Obviously, prisoners do not see it this way. Nor do juveniles in a training school or patients sent, against their will, to mental hospitals. Any deprivation of liberty is a burden and a punishment. Of course, there are other factors to be considered. Detention, in each case, follows some procedure or ceremony which degrades and stigmatizes the subject. All too often, the "benefits" promised are a fraud. The gap between theory and reality is as wide as the ocean. The "home" offers nothing but pure punishment. Still, that the "benefits" are involuntary lies at the heart of the mischief. In fact, coercion may be one reason why the benefits fail to benefit at all.

Coercion is a matter of degree. All programs are manipulative; all choices are more or less structured. Between a pure cash bribe and pure physical force are many little substations of inducement and threat. Compulsory education laws are genuinely popular. So are vaccination laws. But in both cases, the sanctions are rarely used. Most people willingly go or willingly send their children to school. The compulsion for these people is unreal, the free education is a precious gift. A few people object to education on moral or religious grounds; some object to vaccinations. For them, the compulsion is terrible and real. Virtually <u>all</u> prisoners are forced into prison. In this fact lies the difference. The point can be underscored by contrasting social attitudes toward the "drop-out" and the truant. The truant is (in general) treated as deliquent; he is hounded and oppressed; he is liable to be sent to an institution little better (at least in his eyes) than a prison. After a certain age, however, students who find school meanginless

or a burden can drop out of their own free will. They are deplored and (increasingly) coaxed at and worried about. But programs for drop-outs differ fundamentally from truancy laws because they must use the carrot instead of the stick.

Programs then can be arranged in a line from the voluntary to the coercive. The form of the benefit is not unrelated to the degree of free choice on the part of the beneficiary. Cash gifts, as we noted, maximize choice; gifts in kind are more limited. Yet the matter is not all black and white. The school lunch program is a benefit in kind; but it does not seem particularly oppressive. Money can buy almost anything; but there <u>are</u> things that almost anybody would buy with their money, or at least are not likely to object to.

On the other hand, there are benefits which, it is known, appeal only to a few or to a special group of people. These can be left wholly voluntary, since a kind of benefit market takes care of the demand. We may call these benefits <u>services</u>. They are available upon request, but in fact most formally eligible persons do not take advantage of them. Everybody is entitled to free (or cheap) government pamphlets on gardening or baby care. But not everybody needs them or wants them. In other cases, there are natural limits on the demand (maternity benefits are an obvious case); in still other cases, the service requires a substantial input. Yellowstone Park can serve once more as an example. The long dusty road through Wyoming serves to filter out much of the demand.

The line between the voluntary and the coercive roughly parallels another line, between conditional and unconditional benefits.[39] In a sense all benefits are conditional; they require some slight action on the part of the beneficiary, as a prerequisite to enjoyment, even if it is nothing more than cashing a check. The rights to some benefits are vested. An eligible person receives such a benefit without any action on his part, other than formalities. The right to enjoy is certain, but postponed. Often a beneficiary may not even divest himself of the right. Certain death benefits are in this category.[40] Vested, unconditional benefits are, generally, those toward the middle-class end of the spectrum of welfare programs. That a benefit is vested does not mean, however, that it is bound to be treated as a full property right. It may, for example, not be transferable. Usually, this means that, in some realistic sense, the beneficial unit is not an individual but a family. When a worker covered by workmen's compensation dies, a death benefit becomes payable to members of his immediate family.[41] He cannot avoid this benefit, nor can he dispose of it by gift or will. The price of this fixity is that the benefit cannot be used as a device to manipulate behavior.

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[39] In the previous section, we discussed conditions for eligibility, which are at least analytically distinguishable from conditions for benefits.

[40] Few rights are so absolutely vested that they cannot be released or avoided, under extreme conditions. But if divestment is rare and requires solemn and deliberate action by the person relinquishing the right, the right is vested to all intents and purposes. Moreover, relinquishment is rare enough to be disregarded if the benefit is money and there are no strings attached. Money is a benefit which -- at least in our society -- nobody objects to and virtually nobody turns down.

[41] See Wis. Rev. Stats. § 102.45 - 102.51

Many, if not most, conditions are governing devices: they channel and control the behavior of clients. They also ration scarce benefit resources; and they serve administrative ends. Public housing tenants must pay rent every month. The rent is a condition which keeps costs down; it also affects who the tenants are. People who apply for a marriage license must take a physical examination and pay a fee. The license itself is a condition of valid marriage; it serves both control and recording functions. In other programs, beneficiaries must report income, submit to investigations, fill out forms. Sometimes, as we have mentioned, the conditions are offensive and costly. When this occurs, of course, a certain number of people will pass up the program, even though they are formally eligible.

Such conditions get attached to benefits granted to politically powerless groups. The onerous conditions reinforce stigma of membership; they do not create it. An army uniform is a sign of honor, a prisoner's a sign of shame, a policeman's is a source of pride or fear, depending on who views it. Onerous conditions also flow from the public's fear that easy benefits will pose the problem of incentives. The poor will not be motivated to improve themselves; the indolent and the thievish poor will be rewarded. Onerous conditions, one might expect, cluster around relatively involuntary programs. The matter is not unrelated to the general style with which a government agency handles its public. Employees of the National Park Service seem to be unfailingly helpful and polite, no matter how exasperating the tourists might be. This may be simply a matter of service tradition. The visitors are usually middle-class people with more than the ordinary penchant for

writing to Congressmen. More important, they come of their own free will; they have alternatives. Postal clerks and employees who process drivers' licenses in the main, seem to be much more surly toward their public. They have what amounts to a captive clientele. Poor people who sit all day on a hard bench, waiting for service at a clinic or a social worker's time, are paying the price of economic captivity. They have nowhere else to go; no easy avenue of protest; no way to make a protest stick.[42]

V. Some Remarks on Administration of Welfare

Most of my analysis has been directed toward the structure of welfare programs. Necessarily, of course, we have dealt somewhat with administrative provisions as well. Two administrative variables will be briefly discussed in some additional detail: the choice of sanctions and the device of jurisdictional provisions.

1. Sanctions:

Laws are usually meant to influence behavior. They consist of directives to officials authorizing them to act; they typically also authorize, forbid or influence private, non-official behavior. The sanctioning aspect of law is complicated and relatively poorly explored.[43] Enacted law is often highly effective without anyone lifting a finger to

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[42] S. Friar, "Welfare from Below: Recipients' Views of the Public Welfare System," in J. Ten Broek, ed., The Law of the Poor (1966) 46, found welfare recipients to be rather submissive. They accept as just many onerous rules and conditions. Possibly the potentially rebellious simply opt out of the system.

[43] Recently, there has been some progress in thinking through some basic problems of the theory of sanctions. See W. Chambliss, "Types of Deviance and the Effectiveness of Legal Sanctions," 1967 Wis. L. Rev. 703; R. Schwarz and S. Orleans, "On Legal Sanctions," 34 U. Chi. L. Rev. 274 (1967).

enforce it; often, to the contrary, law remains a "dead letter." Enforcement means the imposition of a penalty, civil or criminal, or unwanted conduct. Compliance can be enforced through subsidy. Direct cash subsidies are an important instrument of policy; farm price supports are an example. There are other, more subtle variants on this theme. To allow an individual or group to do something previously forbidden is a kind of subsidy. Hence any creation of new rights, or the lessening of old burdens, is a kind of subsidy. Frequently, the law tries to control and influence behavior by setting out conditions that must be met if people are to accomplish certain results they are known to desire. For example, under the law of many states, a person may make a will, but the will must be in writing, signed by the testator, and attested by at least two witnesses. These formal requirements assume, quite correctly, that many people will wish to choose who will inherit their property when they die. Hence, they will comply with the state's requirements. The state's desire, among other things, is to ensure orderly transmission of property at death, through a formal, written, and recorded document. The statute of wills, then, might be said to subsidize compliance with formalities. Of course, with equal logic, one might emphasize the penalty aspects of the law. If a man makes a defective will (only one witness, say), he loses his privilege of naming his heirs. This, in a real sense, is a penalty imposed for failure to comply with statutory provisions. The distinction between subsidy and penalty, in other words, is somewhat artificial. A lot depends on the way one looks at one and the same provision.

Moreover, complex legislation is usually complex in regard to sanctions as well. Social welfare legislation is no exception. A whole battery of devices may be used to coerce, cajole, and channel action. Many questions of sanction have already been touched on in this discussion. Eligibility procedures, for example, tend to dangle benefits at the end of a hook. The "hook" may be designed to cut costs, keep people away -- or attract them, or to induce some socially-desired behavior. Welfare laws, like most regulatory laws, also make use of a whole battery of remedies. Some of these are civil, some criminal. Agencies for example, may have the right to recover welfare expenditures from relatives of the poor. It is a crime to defraud a welfare agency.

A major issue in welfare policy is the extent to which different kinds of sanction are to be used. Can public assistance, for example, be made more self-policing? The federal income tax serves here as a model. The tax law is supported by a tremendous battery of enforcement devices: liens, criminal investigations, audits. It is ruthlessly and efficiently enforced. Yet, in the main the system runs itself. People voluntarily file and comply. No doubt, they are heavily influenced by the threat of force. But auditing and investigation come <u>after</u> violations, not before. No one disputes the right of public agencies to ferret out and punish those who are robbing the public. But long, offensive investigation <u>before</u> admission to a program is quite a different thing. Can welfare recipients be trusted to police themselves? Shall the degree of surveillance be diminished? In the past, the "middle-class" type of welfare program was much more likely to be routinized and automatic. For these, it was easier to convince

the relevant public that self-policing would work. The demands of the welfare clients themselves, in many cities, are forcing government agencies to re-examine the question of how much surveillance is needed, and the whole sanction system of welfare laws.

Choice of sanction, obviously, has a tremendous impact on the cost of a particular program. Welfare legislation, as we define the term, is bound to be more costly than simple regulatory or punitive legislation. When some policy is decided upon, there must be a further decision on the question of the choice of means. Again, very broadly, there are two: coercion or subsidy. The policy dictates which must be used, often enough. It would be absurd to forbid people to be poor. On the other hand, there are policies where (it seems) the choice is a real one. Slum housing is a perfect example.[44] The government can try to clean up the slums by rigorous housing codes; or it can build better houses, pay peoples' rents, and subsidize private builders. The first approach is not, strictly speaking, welfare legislation. But if it works, it is by far the cheapest. The only expenditures required are for law enforcement. Unfortunately, the approach does not seem to work, at least not so as to satisfy the strident demands for some kind of cure for the slums. We may take it as axiomatic that a government will try to satisfy the most demands made upon it at the least cost. The axiom seems particularly apt in a year (1968) when the national government, badly strapped for money to run its war, is pushing a program of consumer legislation, and open-housing legislation, neither of

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[44] The general themes in this paragraph are chiefly a restatement of the argument in L. Friedman, "Government and Slum Housing: Some General Considerations," 32 Law and Contemporary Problems 357 (1967).

which cost much money. Of course, they may be high-cost measures in some other sense; but that remains to be seen. In housing law, government has always preferred repression; since repression has not worked, government has tended to turn to the cheapest possible subsidies. This is one reason for preferring to stimulate private enterprise through subsidy, rather than building public homes. In general assistance, where transfer payments are unavoidable, cost cutting has taken, as we have seen, a more oblique form.

2. Jurisdiction:

The political structure of welfare legislation is worth treatment in its own right and at length; hardly any aspect of welfare laws is more important. Some programs are federal, some state, some local, some federal-state, some state-local, some federal-local; these choices carry with them far-reaching consequences. In the twentieth century, many novel variations have been rung on the classic themes of American federalism. Within the states, there has been a luxuriant growth of new, overlapping jurisdictions. Every person stands within an incredible number of circles of jurisdiction -- nation, state, county, municipality, school district, perhaps sanitation district, conservation district; he lives in a "zone" as well as a neighborhood; all sorts of competing and conflicting layers of officialdom may lay their hands on him.

In this regard, welfare programs are not unique. Welfare programs are administered; they are run by agencies, branches of government, and public organizations. Organizations are bureaucratic and hierarchic. Within any organization, there must be division of labor -- jurisdictional aspects -- these internal jurisdictions exist quite apart from the

technical, legal aspects of external jurisdiction and the stance of a program within a federal system. Not that internal and external jurisdictions are totally independent of each other. The choice between federal and local administration looks like a clear choice between a highly centralized and a highly decentralized program. But things are not so easily put in pigeon-holes. Veterans' benefits are wholly federal and highly centralized. So is the Army and the post office. The draft is wholly federal and not highly centralized; urban renewal is probably in the same general category. Does a high degree of federal and organization centralization mean that a program will be run by professionals rather than amateurs? As the state and federal governments gained power in welfare administration, at the expense of county and city government, this did tend to happen. But one must be careful, again, not to confuse the two types of jurisdiction. Some state programs are tightly controlled (at least verbally) by statutes which specify in minute detail what is and what is not to be done. Other laws delegate broad, apparently unlimited power to sub-agencies,[45] or to those who will actually run the program. Both kinds of law may be "central" in that no formal jurisdictions are created below the level of the state. But one kind may set up a government of clerks and the other may allow for sweeping professional discretion. On the federal level, Social Security (OASDI) is an example of a government by clerks. Most decisions have been "preformed."[46] There are, of course, many professionals in the agency, but ordinary policy is routinely carried out. Urban renewal,

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[45] J. Handler and A. Goodstein, "Law and the Legislative Development of Public Assistance," forthcoming Wisconsin Law Review.

[46] For the term see H. Kaufman, The Forest Ranger, A Study in Administrative Behavior (1960), p. 91.

on the other hand, is at least supposed to lean heavily on professional planners for the devising of ordinary policy; and the tropps of general assistance are "case-workers" with special training in their field and the more the better.

Fragmentation of legal and political power may be a quirk of American political culture.[47] Politics determines, at least in many cases, the other kind of choice, between centralization and delegation. It is the "middle-class" programs which tend to centralize and tend toward a government of clerks. These are the programs that have shifted power away from officials and into the hands of the beneficiaries. This, after all, is another way of looking at a "right." If government reduces itself to a roomful of clerks with merely ministerial duty, program initiative passes to the beneficiaries themselves. It is they who decide. Once a statute in a state sets up a deer-hunting season, fixes a license fee, and turns the matter over to clerks, it is the man in the street who decides whether he will hunt the deer or not. If he does, and has the money, government has no choice but to grant him the license. Bureaucracy is tyranny, but of a special sort. For those who comply with rigid rules, and who can know and master the rules, it is far more manageable than the free discretion of the professionals. Hence, the middle-class tends to demand, paradoxically, that programs be as bureaucratized as possible. They object to the substance, not the form of the rules. The poor tend to be victimized by "flexibility" in government. Even bureaucracy is more oppressive for them. They are much less likely to know how to deal with clerks, and no one listens to them if and when they scream.

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[47] See Andrew Shonfield, Modern Capitalism, The Changing Balance of Public and Private Power (1965) pp. 298-329.

What, then, of programs like urban renewal, which are unbureaucratic and decentralized? Here different forces are at work. In a sense, it is an illusion that these are federal programs at all. The national government provides a pot of gold for local governments. These decide what kind of program they want, and how they will run it. Federal controls are technical and financial; the essential decisions are local. No community has public housing or urban renewal unless it wants it. No program is shaped decisively in Washington. Hence, the "program" that must be realistically discussed is the particular plan in city A or city B. A lot more studies of the way these plans are made would be needed before one could speak confidently of urban renewal as a whole.[48]

It is clear, then, that delegation and jurisdiction refer to a whole range of different choices that may be made through law. There is a choice between public agencies; and a choice to use more or less public power, more or less private initiative. Politics and cost considerations always enter into the decisions. It is often cheaper to delegate to the private sector than to take public responsibility for some job. This matter was touched on, from a different angle, in the discussion of sanctions. As we saw, the first push on slum housing took the form of punitive laws. These laws (usually called tenement house laws) were state and local laws. They can be looked at as a crude attempt to force private landlords to upgrade their property out of their own resources. From the 1930's on -- without abandoning housing codes -- government began to build houses and rent them at low rents to the

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[48]There has been, of course, some incisive study of urban renewal, for example, S. Greer, Urban Renewal In American Cities (1965)

poor. Almost all of the public building has been federal. In fact, it was only the cost that was federalized; local government still decided if it wanted the program at all and (within limits) how much. The costs of other welfare programs have also shifted toward Washington. In the 19th century, poor relief was run on the county level. Private participation was considered indispensable. Poor orphans were frequently bound out as apprentices. And paupers were sometimes farmed out to the lowest bidder -- the private person who, at least cost to the township, would undertake their care.[49]

Over the last century, relief has been centralized and socialized. But the desire to solve welfare problems through stimulating the private market remains very strong. Obviously, one reason for this popularity is cost. A dollar spent on a goal by the private sector is at least a dollar of tax money saved and maybe more. In 1965, for example, the public housing laws were amended to permit local housing authorities to lease apartments in privately owned houses, the authority would then sub-lease to the poor.[50] The program had many stated goals. It might satisfy people's housing needs better than the "projects" conventional public housing. It might help racial and economic integration. It also seems financially worthwhile. The leasing program may induce some private landlords to upgrade their property, since the government

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[49] See F. Philbrick, ed., The Laws of Indiana Terrirory 1801-1809 (1930), pp. 308-9, law of 1802, which charged the overseers of the poor in each township with the duty of causing paupers "to be farmed out at public vendue, or out-cry, to wit: On the first Monday in May, yearly and every year, at some public place . . . to the person or persons, who shall appear to be the lowest bidder or bidders."

[50] Housing and Urban Development Act of 1965, § 23, 43 U.S.C. § 1421b.

is willing to give them long leases and stands behind the rent and the good behavior of the tenants.

But more is involved than the worthwhile goals and the cost savings of the programs. Leasing is politically sound. Private incentives are popular. Even the real estate boards, sworn enemies of public housing, like the new program. Centralization and socialization may be inevitable trends in 20th century government, including welfare administration, but the general structure of American government remains what it was, and the national culture is a constant, in the short run. Bargaining, co-optation, compromise, and interest group manipulation are inevitable elements in the articulation of any program. "Jurisdiction" is only its formal, structural side.

VI. A Concluding Word

We began this essay with a problem in definition. But after that, most of our effort has been spent on classifying programs and sorting them into categories. Many distinctions were drawn and discussed. They tended to overlap, repeat themselves, and blur into one another. But one theme seems to emerge with a fair measure of clarity. We can group welfare programs into definite groups. At one extreme are the "middle-class" programs. In them, benefits will usually be a matter of right; eligibility is earned; benefits are restitutionary; the means test is avoided. At the other end of the scale are the charity or pauper laws. Their characteristics are flatly the reverse of the "middle-class" laws.

That this split exists is hardly news. That its source is social and political is also an ancient insight which is, alas, more easily grasped than coped with. American society obviously faces a crisis of

welfare. As everyone knows, the crisis of welfare is also a crisis of race. The crisis is dangerous and real even though the poor are probably better off here than in most other countries, and probably better off now than in the American past. A crisis comes when a situation is brittle and intolerable. This is a matter of feeling, not of precise and measurable fact. There are countries boiling over with revolution which have much higher standards of living than countries that seem quiescent and serene. Every articulate voice in recent years seems to agree with every other such voice that there is something wrong with American welfare. There is no general agreement what is wrong; or what to do. Mostly, of course, people are speaking of modern poor relief and such programs as public housing. Other people are calling for new kinds of transfer payments, or new programs of job guarantees. This essay propounds no answers to the basic questions of welfare. But it does try to make a little clearer the context in which answers can be looked at, perhaps even where they may be found.